FILED
JUN 25 1973
MICHAEL RODAK, JR., CLE

No. 72-1470

In the Supreme Court of the United States

OCTOBER TERM, 1972

BOB JONES UNIVERSITY, PETITIONER

v.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY OF THE UNITED STATES, AND DONALD C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1470

BOB JONES UNIVERSITY, PETITIONER

v.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY OF THE UNITED STATES, AND DONALD C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

Petitioner is an eleemosynary religious organization which has chosen the field of education, principally at the college level, as the vehicle for teaching and propagating its religious beliefs. (Pet. App. A-14; R. 32-35).[1]

Petitioner and its predecessor have enjoyed tax-exempt status under Section 501(c)(3) of the Internal Revenue Code and its 1939 Code predecessor since at least 1942, during which time there has been no significant change in petitioner's principles or practices. (Pet. App. A-15.) In 1970, the Internal Revenue Service announced that it would no longer allow tax-

[1] "R." references are to the record appendix filed in the court of appeals.

exempt status under Section 501(c)(3) to private schools having racially discriminatory admissions policies, nor would it treat gifts to such schools as tax deductible charitable contributions under Section 170 (c)(2) of the Code. The Service also announced that, although the nondiscrimination requirement would not affect a school's admissions policies which had no relation to race, the requirement would prohibit allowance of the tax benefits to church-related schools which discriminated on the basis of race. (R. 60-62.)

In November 1970, the Internal Revenue Service addressed a letter to each private school in the United States (including petitioner) which had an individual tax-exemption ruling, seeking information respecting each school's admissions policy regarding race. Petitioner's response, indicating that it had a racially discriminatory admissions policy, set in motion the administrative process for determing whether its tax exemption and deductibility assurance ruling should be withdrawn. (R. 81-82.) After several conferences with officials of the Internal Revenue Service, but before petitioner had exhausted its administrative remedies for protesting the proposed withdrawal of its ruling and the assessment of taxes, petitioner brought the present suit for an injunction. (R. 80-85.) The complaint alleged that petitioner would sustain irreparable injury if its outstanding ruling recognizing tax exemption and assuring deductibility of contributions were suspended or revoked, since petitioner would lose large amounts of contributions and would incur roughly $100,000 in accounting expenses in preparation for the assessment of income taxes against it and the contesting of those taxes in litigation. (Pet. App. A-16—A-17.) The suit therefore requested preliminary and injunctive relief on

the ground that the policy of the Internal Revenue Service was unconstitutional and unlawful. (R. 9-13.)

The district court issued a preliminary injunction against the respondent Treasury officials prohibiting them from revoking or threatening to revoke petitioner's existing ruling *pendente lite*. (Pet. App. A-21—A-22.) The court of appeals reversed, holding that the district court had no jurisdiction to hear the suit since the action was actually a suit to restrain tax assessment prohibited by the Anti-Injunction Act (Internal Revenue Code, Sec. 7421(a)). The court acknowledged that petitioner would sustain irreparable injury by reason of a decrease in contributions during the period between suspension or revocation of its advance ruling and the conclusion of a Tax Court or refund action. Nonetheless, the court held that petitioner had not satisfied the second prerequisite for an exception to the Anti-Injunction Act prohibition—that it show that "under no circumstances could the Government ultimately prevail" on the merits "under the most liberal view of the law and the facts." *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7. (Pet. App. A-3—A-7.) On March 21, 1973, the court of appeals denied petitioner's petition for rehearing *en banc*. (Pet. App. A-10—A-12.) On April 3, 1973, the Chief Justice denied petitioner's Application for a Stay of Mandate.

The instant case raises the same jurisdictional issue as that now before the Court in *Americans United, Inc.* v. *Walters*, 31 A.F.T.R. 2d 582 (C.A.D.C.), certiorari granted, No. 72-1371, June 4, 1973. In that case, the court of appeals held that the Anti-Injunction Act (26 U.S.C. 7421(a)) and the tax exception to the Declaratory Judgment Act (28 U.S.C. 2201-2202) did not preclude an injunction suit by a tax-exempt organization to

require the Internal Revenue Service to reinstate its deductibility assurance and tax exemption ruling.

Although the instant case and *Americans United* raise the same basic jurisdictional issue and are in direct conflict,[2] they involve very different substantive contexts and represent considerably divergent points on the substantive spectrum from which this jurisdictional issue can arise. In *Americans United* the Commissioner determined that the taxpayer's lobbying activities violated the explicit statutory prohibitions set forth in Sections 170(c)(2) and 501(c)(3), and revoked the taxpayer's 501(c)(3) exemption ruling on that basis. Taxpayer's suit for reinstatement of its ruling attacked the constitutionality of that statutory prohibition. In the instant case, the Commissioner revoked petitioner's ruling not on the ground that petitioner had violated any explicit statutory provision relating to religious or educational organizations, but on the ground that an organization which pursues racially discriminatory policies does not conform to the overriding general concept of a "charitable" organization. See *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), affirmed *per curiam sub nom. Coit* v. *Green*, 404 U.S. 997. Petitioner attacks the Commissioner's actions on grounds, *inter alia*, that the Internal Revenue Code does not permit denial or revocation of an exemption ruling on a broad public policy

---

[2] The Court of Appeals, on rehearing, distinguished this case from *Americans United* on the ground that, since the taxpayer in *Americans United* was still exempt under 501(c)(4), it could not litigate the issue of its own exemption. (Pet. App. A-11.) This analysis erroneously ignores the fact that the taxpayer's loss of its 501(c)(3) exemption in *Americans United* rendered it liable for federal unemployment (FUTA) taxes, and that it can raise the issues it would prematurely assert in a suit for injunction when its liability for FUTA taxes is litigated.

ground not set forth explicitly in the Code itself, and that the specific policy asserted by the Commissioner here violates petitioner's freedom of religion.

As we explained in our petition for certiorari in *Americans United,* this jurisdictional issue is of substantial administrative importance. In addition to the instant case, the issue has been decided in the government's favor in the case of *Crenshaw County Private School Foundation* v. *Connally,* decided March 14, 1973 (No. 72-2775, C.A. 5), rehearing denied, April 27, 1973; *Dolles Foundation* v. *Moysey,* 250 F. 2d 166 (C.A. 2); and *Liberty Amendment Committee of the U.S.A.* v. *United States,* decided June 19, 1970 (C.D. Cal., No. 70-721-HP), affirmed *per curiam,* July 7, 1972 (No. 26,507, C.A. 9), certiorari denied, 409 U.S. 1076.[3]

We therefore join in urging that the petition be granted for the purpose of resolving the jurisdictional issue whether a taxpayer is barred by the Anti-Injunction and Declaratory Judgment Acts from obtaining injunctive or declaratory relief which would prevent the Commissioner from withdrawing, or would require him to issue or reinstate, a ruling that a taxpayer is exempt under Section 501(c)(3) and eligible for tax-deductible contributions under Code Section 170(c)(2).[4] If the

---

[3] The opinions of the district court and of the court of appeals are not reported, but are printed as Appendix E to the government's petition for certiorari in *Americans United.*

[4] Petitioner also seeks certiorari here (Pet. 3) on the substantive issue whether the Commissioner's refusal to allow tax-deductible contributions and tax-exempt status to schools with racially discriminatory admissions and operational policies is contrary to the provisions of the Internal Revenue Code and in violation of the religion clauses of the First Amendment and the due process clause of the Fifth Amendment. If the government prevails on its Anti-Injunction Act argument, the substantive issue need not

petition is granted, it may be appropriate to set this case for oral argument immediately before or after the argument in *Americans United,* or to consolidate it with that case.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE, 1973.

---

be entirely resolved, since, under the test set forth in *Enochs* v. *Williams Packing Co., supra,* a decision in the government's favor on the jurisdictional issue will indicate only that petitioner has failed to show that "under no circumstances" could the government prevail on the substantive issue. If the petitioner is to prevail, however, it must show that its racial discrimination policy does not disqualify it from tax exemption as a matter of legal certainty. The substantive issue is, therefore, included in the jurisdictional issue to the extent defined in this memorandum. See Rule 23, 1(c) of the Revised Rules of this Court.

DOJ-1973-06